

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
F.D. MITCHELL, J.A. MAKSYM, B.E. DELURY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**SHANE A. CHRISS
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 200900449
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 30 January 2008.
Military Judge: LtCol Eugene Robinson, USMC.
Convening Authority: Commanding Officer, 3d Assault
Amphibian Battalion, 1st Marine Division, Marine Corps Air
Ground Combat Center, Twentynine Palms, CA.
Staff Judge Advocate's Recommendation: LtCol R.J.
Ashbacher, USMC.
For Appellant: CDR R.D. Evans, Jr., JAGC, USN.
For Appellee: Capt Mark Balfantz, USMC.

15 June 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of two specifications of unauthorized absence and unlawful use of methamphetamine, in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The accused pleaded guilty in accordance with the terms of a pretrial agreement which provided, *inter alia*, for the approval

of any adjudged punitive discharge. However, the agreement further provided for suspension of the punitive discharge if the accused voluntarily waived his right to an administrative separation proceeding. The suspension would run until such time as the administrative separation process was completed and the accused received a DD 214 evidencing his administrative separation, at which time, unless the suspension was sooner vacated, the punitive discharge would then be remitted without further action.

On 30 January 2008, the appellant was sentenced to confinement for 91 days, reduction to pay grade E-1, and a bad-conduct discharge. Following the announcement of sentence, but before the convening authority acted, the appellant engaged in post-trial misconduct by wrongfully using D-Amphetamine on or between 30 January 2008 and 19 February 2008. Pursuant to paragraph 12 of the pretrial agreement, the convening authority gave the appellant notice of a hearing pursuant to Article 72, UCMJ, and RULE FOR COURTS-MARTIAL 1109, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) to determine whether the appellant committed the alleged misconduct and, if he did, whether the convening authority would be permitted to withdraw from the sentence limitation provisions of the pretrial agreement.

On 01 April 2008, the convening authority conducted a hearing at which the appellant was represented by assigned military counsel (the same defense counsel that represented the appellant at trial). The test results from the drug screening lab and the appellant's written statement denying any wrongful use of amphetamines were considered by the convening authority. Following the hearing, the convening authority determined there was probable cause to find that the appellant committed wrongful drug use in violation of Article 112a, UCMJ.

The convening authority executed DD Form 455 (Report of Proceedings to Vacate Suspension of a General Court-Martial Sentence or of a Special Court-Martial Sentence including a Bad Conduct Discharge) on 9 April 2008 and forwarded the matter to the officer exercising general court-martial jurisdiction (OEGCMJ) over the appellant for further proceedings. On 18 April 2008, the OEGCMJ authorized the convening authority to withdraw from the pretrial agreement sentencing limitations, namely the suspension of the bad-conduct discharge. The OEGCMJ found the appellant violated the misconduct provisions of the pretrial agreement and determined that good order and discipline required the vacation of the agreement to suspend the punitive discharge.

On 17 June 2008, the convening authority approved the sentence as adjudged, and, except for the punitive discharge, ordered it executed. In accordance with the misconduct provisions of the pretrial agreement and the post-trial proceedings under Article 72, UCMJ, and R.C.M. 1109, the convening authority did not suspend the bad-conduct discharge or confinement in excess of 90 days.

The appellant raises two assignments of error. He first alleges as error that the Government's omission of the record of post-trial hearing and exhibits considered render the record of trial incomplete and preclude meaningful appellate review.¹ The Government responds that the attachment of the missing post-trial records moots the appellant's claim. We concur and find this assignment of error to be moot. In a footnote, the appellant also avers that he was denied timely post-trial review of his court-martial.

We have carefully reviewed the record of trial, the appellant's assignments of error, the Government's Consent Motion to Attach of 10 November 2009, granted by us on 16 November 2009, and the Government's answer. We conclude that the findings are correct in law and in fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

The appellant did not raise post-trial delay as an assigned error, although he did discuss it at some length in a footnote.² The appellant points out that the convening authority did not complete his action within 120 days from the adjournment of the

¹ The appellant also contends that there was substitute counsel assigned in this case and there is not documentation of such substitution in the record. In a letter to the Office of the Judge Advocate General, the convening authority in the last paragraph says that "service of the SJAR on the substitute defense counsel" In this same letter, reference is made to "detailed defense counsel" six times. There is only one reference made to "substitute defense counsel" and that in the penultimate paragraph of the letter. The record of trial clearly indicates that there was only one detailed military counsel at trial. This same detailed counsel represented the appellant at the post-trial misconduct hearing, submitted a clemency request on the appellant's behalf and accepted service of the record of trial, SJAR, and action. There is no indication of "substitute defense counsel" anywhere else in the record. This reference appears to be a scrivener's error that does not materially prejudice the substantial rights of the appellant.

² The appellant states that he cannot demonstrate "actionable prejudice" stemming from the convening authority's delay in taking action or the Government's delay in docketing the case for appeal. The appellant, nevertheless, states that such delay was "unreasonable".

court-martial and that this case was docketed with this court over fourteen months after that. The appellant does not allege any specific prejudice due to that delay.

The convening authority attributes his delay from adjournment to action largely to the increase of contested courts-martial and the reduction of personnel. His explanation appears reasonable. The Government's delay in docketing is attributed to "administrative error in failing to properly forward the record to this Court." Government's Answer of 24 Nov 2009 at 10. Such failure, coupled with the time wasted chasing down documents evincing an important post-trial proceeding-documents that should have been in the record in the first place-lead us to conclude that the delay in this case is "facially unreasonable." *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006).

Assuming that the appellant was denied the due process right to speedy post-trial review and appeal, we proceed directly to the question of whether any error was harmless beyond a reasonable doubt. *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). Here, there is no evidence of any specific harm resulting from the delay and the appellant has not alleged any such harm. There is no issue that would afford the appellant relief, no oppressive incarceration resulting from the delay, no particularized anxiety caused by the delay, and no rehearing has been ordered which might be impacted by excessive post-trial delay. See *United States v. Haney*, 64 M.J. 101, 108 (C.A.A.F. 2006); *Moreno*, 63 M.J. at 139. Having carefully reviewed the record of trial, the appellant's assertion of nonprejudicial but unreasonable delay, and the Government's response, we conclude that the assumed error was harmless beyond a reasonable doubt. *United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008).

We next consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ, in light of *Toohey v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004) and *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and the factors articulated in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim. App. 2005)(en banc). Having done so, we conclude that the only meaningful relief available (disapproving the adjudged bad-conduct discharge) would be an undeserved windfall for the appellant, and disproportionate to any possible harm the appellant suffered as a result of the post-trial delay. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006). Therefore, we find that the delay in

this case does not affect the findings or sentence that should be approved. Art. 66(c), UCMJ.

Accordingly, the findings and approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court